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No. 85-847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN MASON, *et al.*,

Petitioners,

v.

THE CONTINENTAL GROUP, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS, THE CONTINENTAL GROUP, INC., AND CONTINENTAL CAN, U.S.A., IN OPPOSITION

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QUESTIONS PRESENTED

Respondents, The Continental Group, Inc. and Continental Can Company, U.S.A., believe that the following represent the issues raised in the Petition more accurately than Petitioners' presentation:

I. May employees who feel dissatisfied with the termination of employment ignore the internal review procedures established by their collective bargaining agent (including procedures for review of pension benefits) and proceed immediately to court for alleged violations of the Employee Retirement Income Security Act of 1974 ["ERISA"]?

II. Having failed to pursue their claims through collectively-bargained-for grievance and arbitration procedures, may Petitioners nonetheless assert claims based on their collective-bargaining agreement and associated contracts?

ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

John A. Mason, III; B. J. Banks; Howard Belcher; Jerry Wayne Capps; Phyllis Jean Castillo; Joseph Ceravolo; John Click; James H. Dobbs; Hugh M. Dugger; Robert L. Epperson; Doyle S. Ethridge; Glenn Farrington; B. Lee Fournier; Philip J. Giaveman; Lulian Jaynes; Elmer E. Johnson; Spurgin L. Johnson, Jr.; Margaret Harman; Joe F. Holland; Melvin E. Lacey; Alfred Ronald Land; Willie Edward Lee; Kermit E. Lindsey; Donald R. Maddox; Stella Morris; J. T. Nichols, Jr.; Clarence L. Osburn; Kenneth G. Pitisci; Donald E. Reach; L.G. Robertson; Jimmy C. Robinson; Floyd A. Rowe; J. E. Sellers, Jr.; Lynnes N. Thompson; George D. Tucker

The United Steelworkers of America
The Continental Group, Inc.[1]

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[1]The Continental Group, Inc. has been merged into KMI International, Inc. whose parent companies are: Kiewit Investment Corp., Kiewit U.S. Co., and Peter Kiewit Sons' Inc. Subsidiaries (except wholly-owned subsidiaries) and affiliates of KMI Continental are: Altradec A.G.; Braskraft S.A. Florestal E Industrial; CCC Finanz A.G.; CCL Industries, Inc.; Cobelplast S.A.; Continental Can Company, Inc.; Continental Can Hong Kong, Limited; Continental Can Nigeria Ltd.; Continental Can Saudi Arabia, Ltd.; Continental do Brasil Industria Y Comercio De Embalagens, Ltda.; Continental Participacoes, Limitida; Convertidora Venezolana De Papel, S.A.; De Clerck N.V.; Dominguez & Cia. Caracas S.A.; Dominguez Continental, S.A.; Doosan Continental Can Manufacturing Co., Ltd.; ETS Schuybroek S.A.; Eagle Reinsurance Ltd.; Elbatainer France; Elbatainer (U.K.) Ltd.; Envases Generales Continental De Mexico S.A.; Fabrica Boliviana De Envases; Industrias Del Norte, S.A.; Jeddah Beverage Can Making Co., Ltd.; KMI Merger Corp.; Kuwait Metal Containers Company Ltd.; Metalurgica Matarazzo, S.A.; Nihon Harrison Ltd.; P.T. United Can Company Limited; Qualiplus USA, Inc.; Schmalbach-Lubeca GmbH; Shellmar Embalagem Moderna, S.A.; Sobemi N.V.; Tedeco S.A.R.L.; The Continental Group European

Continental Can Company, U.S.A.

Industries, S.A.; The Risk Management Center (Bermuda) Ltd.; The Vinoxen Company, Inc.; Thomassen & Drijver Verblifa N.V.; Unicon Producing Company; Verblifa N.V. Excluded from this list are corporations in which KMI Continental or its subsidiaries or affiliates have less than a 10% ownership.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported in *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985); the opinion of the district court, in *Mason v. Continental Group, Inc.*, 569 F. Supp. 1241 (N.D. Ala. 1983). Both are included in petitioners' appendix.

JURISDICTION

The proper source of this Court's jurisdiction to review the judgment of the court below is 28 U.S.C. § 1254(1). This opposition is being filed within 30 days of receipt of a copy of

the petition for writ of certiorari and Appendix as revised, in accord with Supreme Court Rule 22.1.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Employee Retirement Income Security Act of September 2, 1974, 29 U.S.C. §§ 1001-1461, in particular §§ 1001, 1022, 1132, 1133, and 1135. The Petitioners have included the text of 29 U.S.C. §§ 1001 and 1132 in their Appendix; Continental includes the text of 29 U.S.C. §§ 1022, 1033, and 1035 in its Appendix along with the text of 29 C.F.R § 2560.503-1, all of which are pertinent to this matter.

STATEMENT OF THE CASE

The present case arises from an Eleventh Circuit affirmance of a district court decision. The district court had dismissed the action of a number of former employees of a can manufacturing plant that had been closed. Certain of those former employees are the petitioners here. The plant was owned and operated by Continental Can Company, U.S.A., the operating arm of The Continental Group, Inc., both respondents here (hereinafter referred to as "Continental").

Although their pension plan, insurance, and collective bargaining agreements with Continental incorporated grievance and arbitration procedures, the employees sought to perfect their claims in court without attempting to exhaust any remedies available via those procedures.

In their petition for certiorari, the employees set forth fourteen pages of alleged "facts" as support for arguments raised before the lower courts. Continental has already

responded to these allegations in briefs filed below[1] and will not burden this Court with a detailed rebuttal of allegations respondents believe are extraneous to the Court's consideration of whether certiorari should be granted in the instant case. Continental does, however, provide a brief factual and procedural overview of this action for background.

This case arises from the closing of a can manufacturing plant by Continental in Fairfield, Alabama, in late 1979. Beginning approximately in the early 1970s, the can-producing industry, of which Continental is a part, experienced a continual decline in business. This decline was caused in part by an evolution from so-called three-piece to two-piece technology, the latter being less costly. Since 1978, the Southern Division of Continental has reduced the number of three-piece can manufacturing plants it operates from seven to two, with a third plant converted over to producing two-piece cans. Four plants in the Southern Division were closed including the Fairfield facility that employed the petitioners. [Paulson Transcript at 28-29, *Mason v. Continental Group, Inc.*, 569 F.Supp. 1241 (N.D. Ala. 1983)]. [References to the transcripts of depositions are to the last name of the witness.]

All of the petitioners were members of a bargaining-unit of employees represented by the Steelworkers Union at Continental's 411 plant in Fairfield, Alabama. The employees were all covered by a collective-bargaining agreement (hereinafter "Agreement"), insurance plan, and pension plan negotiated on their behalf by the United

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[1]Respondents have replied to the incomplete and contextually misleading presentation of "facts" by the petitioners in detail in their brief filed before the Eleventh Circuit.

Steelworkers of America, AFL-CIO-CLC[2] (USW), with Continental for plant 411 and other Continental manufacturing facilities. [Record at 19, *Mason v. Continental Group, Inc.*, 569 F.Supp. 1241 (N.D. Ala. 1983) (hereinafter "R.____").]

These agreements contain detailed provisions covering seniority, wages, layoffs, severance pay, job transfer options in the event of a plant closing and other terms and conditions of petitioners' employment. [R. 19; Agreement, p. 44, § 12.2, p. 46, § 12.5 (f), p. 71, § 25.1, p. 108, § 28.310] [The Agreement page references are to the internal page numbers of the Agreement itself. A copy of the Agreement is attached to page 19 of the record.]

In addition, the Agreement reserves the following management rights to the company:

> Subject to the provision of this Agreement, the Company shall manage the plant, direct the working forces, plan, direct and control the plant operations, hire, promote and demote, discipline, suspend or discharge for just cause, relieve employees from duty because of lack of work and for other legitimate reasons, introduce new and im-

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[2]The Petition for Certiorari lists the USW as a respondent. In the district court, petitioners amended their claim to include the USW as a defendant on September 9, 1981. The USW moved for summary judgment on April 26, 1982. The district court granted summary judgment in the union's favor based on expiration of the statute of limitations. The petitioners made no allegations of district court error in relation to the union in its briefs before the Eleventh Circuit; indeed that Circuit specifically noted that the petitioners were not appealing the district court's dismissal of the cause of action with respect to the union. 763 F.2d at 1222. There is no reference to the union's summary judgment in the argument contained in the Petition before this Court.

> proved production methods or facilities or change existing production methods or facilities, improve quality, reduce costs, and establish and attain reasonable work and production standards.

[R. 19; Agreement, p. 10]

The Agreement also contains a comprehensive grievance procedure:

> 13.1 Purpose
>
> The purpose of this Article is to provide an opportunity for discussion of any request or complaint and to establish a procedure for the processing and settling of grievances, as defined in Section 13.2.
>
> 13.2 Definition
>
> A grievance is defined as any difference between the Local Management and the Union or employees as to the interpretation or application of or compliance with this Agreement respecting wages, hours, or conditions or employment. Any dispute over whether a complaint is subject to these procedures shall be handled as a grievance in accordance with the procedures prescribed herein.

[R. 19; Agreement, p. 49]

And the pension plan contains a clause that makes the grievance procedure applicable to differences arising under it:

> *APPEALS PROCEDURE*
>
> Any differences that may arise between you and the Company concerning your application for your

> entitlement to or the amount of payment of a lump sum retirement allowance, pension or deferred benefit, may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement . . . .

[R. 47]

As part of the company's management of its business in 1976, Continental Can developed and began to use a computerized data base called Bell I that contained basic items of employee personnel information, including seniority date, job classification, and age. The company used a computer program called Bell II to measure the employee costs of its operations on a current and long-term basis. This information was used for current work force management, for strategic planning, and for other business purposes [Rexford Transcript at 44-45, 57-58, *Mason v. Continental Group, Inc.*, 569 F.Supp. 1241 (N.D. Ala. 1983)].

In September of 1979, Continental announced that it was closing the plant where the petitioners were employed. Company and union representatives met together with each employee individually to review the plant closing provisions of the union contract and to discuss the benefits and options available to that employee. [Middleton Transcript at 30-31 and Newell Transcript at 14-15, *Mason v. Continental Group, Inc.*, 569 F.Supp. 1241 (N.D. Ala. 1983)] The employees were laid off during October and November, with the plant ceasing operations on December 21, 1979. [Gurley Affidavit, *Mason v. Continental Group, Inc.*, 569 F.Supp. 1241 (N.D. Ala. 1983) and R. 81]

At no time during this closedown period did any of the petitioners seek review of their concerns under the provisions of the master agreement, the pension plan, and the

insurance plan. [Gurley Affidavit, R. 82; Newell Affidavit, R. 90-91; Middleton Affidavit, R. 39]

After the actual plant closing, some former employees (but not the petitioners) did in fact file grievances concerning their extended benefits. The grievances were handled in accordance with the master agreement and pension plan review process by staff representatives of the union. [Middleton Tr. 43-46]

The former Continental employees who appear before this Court as petitioners, ignoring the grievance and arbitration provisions of their contract with Continental, filed an action on November 26, 1980, with the Equity Division of the Circuit Court of Jefferson County, Alabama.

After the case was removed to the district court for the Northern District of Alabama,[3] the petitioners amended their complaint to add a claim for damages for violations of the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1461, on March 18, 1981.

On September 9, 1981, Continental moved for summary judgment on the ground that petitioners had failed to exhaust the grievance and arbitration procedures required by the master agreement, pension plan, and other elements of the collective-bargaining agreement. And on July 27, 1983, the district court granted respondents' motion for judgment, finding that petitioners had failed to exhaust their remedies under the grievance and arbitration procedures of the collective bargaining agreement.

In an appeal to the Eleventh Circuit, petitioners contended that summary judgment was inappropriate. The Eleventh Circuit found that the appeal raised issues as to "(1)

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[3]Jurisdiction was based on the provisions of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a).

whether the company's alleged conduct is subject to the collective bargaining agreement, (2) if so, whether plaintiffs should be excused from exhausting remedies provided in that agreement; (3) whether the state law cause of action for breach of fiduciary duty is preempted by the National Labor Relations Act, (4) whether ERISA claims are subject to pension plan appeals procedures; and (5) whether Continental Can was a fiduciary under ERISA and subject to the duties imposed by the Act." *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1221 (11th Cir. 1985).

Addressing the first two issues, the circuit court, citing Article 13 of the master agreement, found that under the collective bargaining agreement in force at the time, claims should have been submitted to arbitration. Because of this finding, the court did not reach the third issue of whether the National Labor Relations Act preempted a state law breach of duty claim. Finally, the court addressed the fourth and fifth issues by analyzing appropriate sections of ERISA and finding that exhaustion of administrative remedies must precede initiation of judicial proceedings. *Id.* at 1221. Thus, the circuit court affirmed the decision of the district court.

For the reasons that follow, this court should not grant certiorari in the instant case.

SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

A. *Petitioners' First Issue:* The major basis posited by petitioners to support their request that a writ of certiorari issue on the ERISA issue is an alleged conflict between the Eleventh Circuit decision here at issue, *Mason v. Continental Can Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), and the decision of the Ninth Circuit in *Amaro v. Continental Can Company*, 724 F.2d 747 (9th Cir. 1984). Petition at 16-17. Contrary to the allegations of the petitioner, there is

no significant conflict among the circuits on the issue of exhaustion of internal review provisions before commencing a judicial challenge under ERISA. At most there is a split of authority within the Ninth Circuit based on different panel interpretations.

Indeed, the one adverse determination arose in the context of an interlocutory appeal, a context which would itself normally preclude the granting of certiorari by this Court. *E.g., American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1892).

Moreover, even if the Court found a conflict, certiorari would be unwarranted based on the likelihood of elimination of any conflict in fact through the evolving interpretation of the exhaustion question in ERISA litigation by the circuit courts.

Finally, a consideration of the *Mason* decision in light of recent Supreme Court pronouncements, developments in circuit court analysis of the exhaustion issue, and the broad reach of the master agreement and pension plan internal review processes indicates that the lower courts correctly decided the instant case.

Nor can petitioners allege that there is any conflict with Supreme Court pronouncements. Cases like *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), address the effect of an arbitration decision on subsequent judicial proceedings (as opposed to failure to use internal review procedures at all) and focus on the particular statutes under investigation. ERISA, unlike the other statutes considered, specifically requires pension plans to include internal review procedures to handle conflicts. Thus, there is no likely conflict with prior Supreme Court pronouncements.

B. *Petitioners' Second Issue:* The second question presented by the petitioners fails to raise any of the issues that are generally considered grounds for the issuance of a writ of certiorari. Moreover, in their caption petitioners inaccurately characterize the issues they raise in the section as deriving from the Labor Management Relations Act. The first half of the argument (Petition, pp. 29-35) centers around the contracts between the parties; and the second half (Petition, pp. 35-41) raises the issue of preemption by the National Labor Relations Act, an issue that was not reached in the circuit court below.

REASONS WHY THE WRIT SHOULD BE DENIED

I. PETITIONERS' FIRST ISSUE: ELEVENTH CIRCUIT'S HANDLING OF ERISA CLAIMS

A. Contrary to the Allegations of the Petitioners, There Is No Significant Conflict Among the Circuits on the Issue of Exhaustion of Internal Review Provisions Including Arbitration Before Commencing a Judicial Challenge under ERISA.

The major basis posited by petitioners to support their request that a writ of certiorari be granted[4] on the ERISA issue is an alleged conflict between the Eleventh Circuit decision here at issue, *Mason v. Continental Can Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), and the decision of the Ninth Circuit in *Amaro v. Continental Can Company*, 724 F.2d 747 (9th Cir. 1984). Petition at 16-17. In reality, there is

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[4]Rule 17 of the Rules of the Supreme Court is not mentioned by the petitioner but provides an indication of the considerations governing this Court's exercise of discretion in deciding which petitions for certiorari will be accepted. Conflict among the circuits is the only allegation of those mentioned in Rule 17 directly raised by the petition. Respondents address *infra* other allegations arguably implied by the petition.

virtual unanimity among the circuits that the exhaustion doctrine may be applicable to an ERISA-based cause of action where collective bargaining agreements provide grievance and arbitration remedies for pension controversies and where the conflict is between a company and its workers. *Viggiano v. Shenango China Division of Anchor Hocking*, 750 F.2d 276 (3d Cir. 1984) (union members sued for injunctive and monetary relief for employer's alleged violations of fiduciary duties under ERISA; court held that union members had to resort to grievance procedures in first instance rather than to resort to ERISA's judicial remedies); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985) (former employee sued under ERISA for enforcement of rights under unfunded, deferred compensation plan; court found that claims under 29 U.S.C. § 1132(a) that are independent of claims based on violations of the substantive provisions of ERISA are subject to arbitration); *Kross v. Western Electric Co., Inc.*, 701 F.2d 1238 (7th Cir. 1983) (former employee brought a class action against employer alleging unlawful discharge in violation of ERISA; court found that employees were required to exhaust administrative remedies in pursuing discharge claim).

There are also cases where employees had to exhaust their remedies when they were making claims against trustees of pension plans: *Challenger v. Local Union No. 1 of International Bridge, Structural, and Ornamental Ironworkers*, 619 F.2d 645 (7th Cir. 1980) (employees brought suit against trustees of union-sponsored pension plan alleging that trustees and plan administrators had violated duties under ERISA; court dismissed complaint for failure to submit to arbitration); *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980) (union member sued union under ERISA for a declaration of the parties' rights under a pension plan and for money damages; court found that union member was

required to exhaust his administrative remedies before bringing suit). *Mason* is thus consistent with other circuit court decisions on the propriety of requiring exhaustion in an ERISA context.

Amaro, not *Mason*, is the anomaly, and any real conflict is limited to the Ninth Circuit where *Amaro* is arguably in conflict with *Amato*,[5] a decision by a different panel of the Ninth Circuit.[6]

Petitioners' attempt to characterize one circuit's internal conflict as a conflict among the circuits is without merit. As Justice Harlan wrote, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Mr. Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 552 (1958). *See also Wisniewski v. United States*, 353 U.S. 901, 902 (1957) [dismissal of certificate to the Supreme Court of question on which an

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[5]The Ninth Circuit in *Amaro* attempted to distinguish *Amato* as presenting a claim which the congressionally mandated internal appeal procedures were designed to hear. Amato's action under ERISA was for declaratory judgment of rights and duties under the pension plan, his assertion being that he was entitled to a full pension from the trust but had on numerous occasions been denied. *Amato*, 618 F.2d at 561. However, the decision in *Amato* was not so limited in its approach, finding that, while the text of ERISA nowhere mentions the exhaustion doctrine, both the legislative history and the text of ERISA show that Congress did intend to grant the authority to the courts to apply the exhaustion doctrine and that sound policy requires the application of the exhaustion doctrine in suits under the Act. *Id.* at 566-67.

[6]The panel in *Amaro* included Circuit Judges Kennedy, Skopil and Pregerson, while the panel in *Amato* was composed of Circuit Judges Wallace and Tang and Senior District Judge Hanson (sitting by designation).

earlier panel of the same circuit has rendered a decision ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties." (citations omitted))].

Just as *Amaro*'s contribution to the Ninth Circuit's intramural conflict presumably would not have provided sufficient basis to cause a writ of certiorari to issue had one been requested following the *Amaro* decision, that intramural conflict should not provide the basis for finding an intercircuit conflict.

Moreover, following the Ninth Circuit's issuance of its remand order in *Amaro*, no final decision on remand has, as yet, been issued by the district court. As explained in *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1892), "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *See Youngstown Co. v. Sawyer*, 343 U.S. 579, 584-585 (1951); *Cobbledick v. United States*, 309 U.S. 323, 324-325 (1940); *Hamilton-Brown Show Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1915); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328, (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). Just as a decision pending on remand is not ripe for Supreme Court review, such a decision should not form an independent basis for seeking certiorari.

Even if it were found that a "significant" conflict exists between *Amaro* and the present decision, it is unnecessary to grant certiorari in this case. As described below, the circuit courts' decisions are evolving through the normal case-by-case adjudication process, sharpening the analysis and understanding of when exhaustion is appropriate under ERISA.

For example, in their examination of the relationship between ERISA and exhaustion, the circuit courts have identified the explicit requirements of ERISA concerning the establishment and publication of internal dispute settlement procedures (29 U.S.C §§ 1133, 1022) as a strong justification for requiring exhaustion of such procedures. *See, e.g, Challenger, supra*, 619 F.2d at 649; *Amato, supra*, 618 F.2d at 567 ("It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used."); *Kross, supra*, 701 F.2d at 1245 (quoting *Amato*); *Barrowclough, supra*, 752 F.2d at 939 n. 15 ("Because the Kidder, Peabody plan did not provide for arbitration as an internal appeal procedure of the deferred compensation plan, we need not decide whether arbitration is required in order to exhaust internal remedies under 29 U.S.C. 1133." (comparing *Kross* and *Amaro*)).

Of the federal laws reviewed in the cases principally relied upon by petitioner [*e.g.*, Petition at 18-21],[7] a statutory requirement that internal appeal procedures be established is unique to ERISA. The requirement for internal review strongly supports the general pattern of court decisions (other than *Amaro*) which find utilization of internal review procedures prior to the commencement of a judicial appeal to be a reasonable requirement.

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[7]Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-49 (1974)); the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (*Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 730 (1981)); Universal Military Training Service Act, 50 U.S.C. app. § 459(d) (*McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265, 266 (1958)); Seaman's Wage Act, 46 U.S.C. §§ 596, 597 (*U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 353 (1971)).

Similarly, building on the Supreme Court's decision in *Schneider Moving & Storage Co. v. Robbins*, 104 U.S. 1844 (1984), the circuits have been examining whether the particular factual setting before them gives rise in an ERISA appeal to the policy concerns that have long undergirded the federal rationale for favoring arbitration. *E.g.*, *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985) (following its interpretation of *Schneider*, the court finds presumption of arbitration does not apply to retirees).

In light of this evolution in circuit court analysis, there is every likelihood that the alleged conflict with the *Amaro* decision will resolve itself in subsequent decisions by the Ninth Circuit.

Finally, when the *Mason* decision is analyzed in terms of the above-mentioned considerations, it is readily apparent that the Eleventh Circuit reached the correct conclusion in requiring exhaustion of the internal review procedures available to the petitioners. *Mason*, which involves a dispute over termination of employment, fits within the classic situation for which arbitration was designed — the promotion of labor peace — as recognized by *Schneider* at 1849. Thus, the presumption of arbitrability should attach to consideration of whether a particular conflict is controlled by the collective bargaining agreement and pension plan. *E.g.*, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). As reviewed in the statement of the case, the master agreement and pension plan between Continental and the petitioners' union contained very broad language as to the issues which would be resolved through the internal review process (*e.g.*, "Any dispute over whether a complaint is subject to these procedures shall be handled as a grievance in accordance with the procedures prescribed herein"). Under well established case law, "when contract language is ambiguous or unclear, a 'healthy re-

gard' for the federal policy favoring arbitration requires that 'any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration.'" *Barrowclough*, *supra*, 752 F.2d at 938 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983)). As the allegations made by the petitioners would fit within the broad reach of the internal review provisions, and as ERISA specifically requires internal review procedures for qualifying pension plans, the *Mason* decision requiring resort to the internal review procedures is eminently reasonable and consistent with both Supreme Court decisions such as *Schneider* and the developing case law in the other circuits.

B. Contrary to the Implied Allegations of the Petitioners, the Decision in *Mason* is Not in Conflict with Decisions of the United States Supreme Court.

Petitioners use the Ninth Circuit decision in *Amaro* to indirectly allege violation by the Eleventh Circuit decision of two Supreme Court decisions, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), on the theory that exhaustion of collective bargaining grievance and arbitration procedures is not required in the context of the ERISA allegations before the Eleventh Circuit. There is, however, no conflict between Supreme Court decisions and the Eleventh Circuit decision in *Mason*.

First, in both *Gardner-Denver* and *Barrentine*, the court action arose *after* internal review procedures were utilized.[8]

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[8] "The issue in this case is whether an employee may bring an action in federal district court, alleging a violation of the minimum wage provisions of the Fair Labor Standards Act, 52 Stat 1060, as amended 29 U.S.C. § 201 *et seq.*, after having unsuccessfully submitted a wage claim based on the same underlying facts to a joint grievance committee pursuant to the provisions of his union's collective-bargaining agreement." *Barrentine*, 450 U.S. at 729-730. "Specifically, we must

In contrast, the petitioners in *Mason* failed to utilize the internal review procedures. The question of the effect of the arbitration results—the issue directly before the court in *Gardner-Denver* and *Barrentine*—is not present in *Mason*, as no arbitration ever occurred.[9] Thus, the cases are factually distinguishable.

Moreover, as this Court stated just last year,

> Our rejection of a rule of preclusion in *Barrentine* and our rejection of a rule of deferral in *Gardner-Denver* were based in large part on our conclusion that *Congress intended the statutes at issue in those cases to be judicially enforceable* and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims *under those statutes*.

McDonald v. City of West Branch, 104 S. Ct. 1799, 1803 (1984) (emphasis added).

ERISA is a statute with a statutory purpose and a set of statutory requirements that are both different from those of Title VII and FLSA, the laws involved in *Gardner-Denver* and *Barrentine*.

One of the major statutory differences is that the pension rights are essentially bargained-for rights—*i.e.*, the result of the collective bargaining process where workers are rep-

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decide under what circumstances, if any, an employee's statutory right to a trial de novo under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Gardner-Denver*, 415 U.S. at 38.

[9]There similarly are some circuit court decisions finding no preclusion on ERISA causes of action from an arbitration decision. *See, e.g., Burke v. Latrobe Steel Co.*, 775 F.2d 88 (3d Cir. 1985).

resented by unions. It is in exactly such situations that this Court has traditionally found a strong policy preference in favor of arbitrability. For example, in *Schneider*, this Court repeated the importance of the long-standing federal policy favoring arbitration in a case involving an alleged violation of ERISA. Trustees of two multiemployer trust funds filed separate complaints against employers in the United States District Court for the Eastern District of Missouri, requesting an order for an accounting and immediate payment of all sums thereby determined to be due. Considering whether the presumption in favor of arbitrability applied (and, hence, whether the case should be dismissed for failure to exhaust grievance/arbitration procedures), this Court focused upon whether the relevant agreements indicated an intent on the part of the parties to require arbitration of the dispute and found significant that trustees, rather than employees or the union, had brought the claim.[10] "Before attempting to ascertain the parties' intent from the relevant agreements," the Court in *Schneider* found it necessary to "determine whether the presumption in favor of arbitrability applied in the Steelworkers Trilogy is applicable here." *Schneider* at 1849 (citations omitted). Concerning the presumption in favor of arbitrability, this Court stated:

> That presumption is an accepted rule of construction in determining the applicability of an arbitration clause to disputes between the union and the employer. Such a presumption furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining. *See Steelworkers v. Warrier & Gulf Navigation Co.* 363 US at 578, 582-583, 4 L Ed 2d

[10]The Supreme Court specifically did not address the issue of whether a contractual obligation to arbitrate the dispute would nevertheless have been invalid as a matter of law. *Schneider* at 1851.

> 1409, 80 S Ct 1347. There is, however, less to commend the presumption in construing the applicability of arbitration clauses to disputes between the employer and trustees of employee-benefit funds.
>
> Arbitration promotes labor peace because it requires the parties to forego the economic weapons of strikes and lockouts. Because the trustees of employee-benefit funds have no recourse to either of those weapons, requiring them to arbitrate disputes with the employer would promote labor peace only indirectly, if at all.

Id. at 1849.

In addition to the strong federal policy favoring arbitration on matters admittedly at the heart of labor peace, important statutory considerations within ERISA indicate that there is likely no conflict between the Eleventh Circuit's opinion and Supreme Court precedents. For example, ERISA requires that every employee benefit plan "provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied" and "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim" (29 U.S.C. § 1133),[11] and that the plan

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[11]Section 1133 provides that:

> *§ 1133. Claims Procedure*
>
> In accordance with regulations of the Secretary, every employee benefit plan shall—
>
> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by

description, as well as the summary plan description (which must be furnished to participants and beneficiaries), include "the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title)" (29 U.S.C. § 1022(b)).[12]

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the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

[12]Moreover, the Secretary of Labor is granted authority to prescribe necessary or appropriate regulations under ERISA. That authority is established at 29 U.S.C. § 1135 and referred to, *inter alia*, at § 1133, quoted *supra*. Regulations promulgated regarding the "claims procedure" requirements of § 1133 appear at 29 C.F.R. § 2560.503-1. Subsection (b)(2) of that regulatory provision establishes that, "in the case of a plan established and maintained pursuant to a collective bargaining agreement", compliance with the regulatory provisions may be accomplished by incorporating by reference grievance and arbitration procedures of the collective bargaining agreement.

The regulation's acknowledgment of the interrelationship between grievance-arbitration mechanisms of collective-bargaining agreements and the claim procedures under plans covered by ERISA is consistent with the legislative history of ERISA which forges an explicit link between suits under ERISA and suits under section 301 of the Labor Management Relations Act (LMRA). The Joint Explanatory Statement of the Committee of Conference on ERISA says that all actions under ERISA to enforce benefit rights under a covered plan or to recover benefits under the plan "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5038, 5107. As part of the federal common law fashioned by the federal courts under § 301 of the

The statutorily mandated internal review procedures of ERISA, which strongly support the determination reached by the Eleventh Circuit in *Mason*, were not present in *Gardner-Denver* (indeed Title VII creates a specific *external* review process to be used by those aggrieved) or *Barrentine*. *See* discussion *supra* at 17-19.

Indeed, other post-*Schneider* circuit court decisions have found that *Alexander* and *Barrentine* were not violated by a requirement of exhaustion of grievance/arbitration procedures where the "labor peace" principle of *Schneider* was present. *See, e.g., Viggiano, supra*, 750 F.2d at 281 (3d Cir. 1984).

II. PETITIONERS' SECOND ISSUE: ELEVENTH CIRCUIT'S HANDLING OF CONTRACT CLAIMS

The second question presented by the petitioners fails to raise any of the issues that are generally considered grounds for the issuance of a writ of certiorari. Moreover, in their caption petitioners inaccurately characterize the issues they raise in the section as deriving from the Labor Management Relations Act. The first half of the argument (Petition, pp. 29-35) centers around the contracts between the parties; and the second half (Petition, pp. 35-41) raises the issue of preemption by the National Labor Relations Act, an issue

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LMRA, it has been established that where administrative remedies are available they must usually be exhausted by an aggrieved party before his § 301 complaint will be heard. *See, e.g., Buzzard v. Local Lodge 1040 International Association of Machinists and Aerospace Workers*, 480 F.2d 35 (9th Cir. 1973). Equally applicable in the context of ERISA is this Court's observation in *United Mine Workers Health and Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982), a case under the LMRA, that "when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract."

that was not reached in the circuit court below. Continental considers: A) the lack of any basis for certiorari, B) petitioners' first, contractual argument, and C) petitioners' second argument, which was not decided below.

A. Petitioners Offer No Basis for the Granting of a Writ of Certiorari.

Petitioners make no allegations that any element of their second question provides an acceptable basis for granting a writ. There is no allegation of intercircuit conflict, no allegation of an incorrect state-court decision, and no allegation of an important question of federal law. Nor, in this case, could any such allegation be made.

The actual basis for all of the petitioners' arguments in the second section of the petition is their contract, the collective-bargaining agreement with Continental. That contract, part of the record in this case, provides direct evidence of the facts relied upon by the Eleventh Circuit in addressing the issues raised by petitioners. Thus, petitioners' argument in this section represents an attempt to have this Court review the evidence presented below and discuss specific facts related to the contract in question. This Court has said "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Discussing its reasons for granting certiorari, this Court has said, "this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Petitioners do not argue that the issues raised in their second section are important to other parties. They simply maintain that the district and circuit courts erred in their characterization of petitioners' claims.

B. Petitioners' Characterization of Requirement for Exhaustion as Arising under the Labor Management Relations Act is Inaccurate and Misleading.

In the caption that begins their presentation of the second issue raised, petitioners represent that "[t]he courts below erred in holding that petitioners' claims were barred as a result of petitioners' failure to . . . exhaust their administrative remedies under the Labor Management Relations Act." [Petition, p. 29]. This characterization places the decisions of both the district court and the circuit court below in an incorrect and misleading light.

The source of the requirement that the petitioners exhaust their administrative remedies is their contracts with Continental, *not* the Labor Management Relations Act. Section 203(d) of that Act provides in part that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d). This Court has said that the policy articulated in this section ". . . can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960). Thus federal labor policy has evolved to support whatever means are chosen by the parties for resolving their differences. This policy was not challenged by the petitioners below.

The analyses of both courts below focused upon their interpretations of the contracts between the parties. Both courts examined the relevant provisions of the contracts to determine whether or not the petitioners were required to exhaust their remedies before bringing a court action. The

Eleventh Circuit devotes three pages to a close analysis of this issue. *See Mason*, 763 F.2d at 1222-24 (1985). The circuit court concluded that petitioners' claims for alleged fraud are in fact claims for wrongful termination and thus subject to a requirement under the contracts for exhaustion of remedies.

Although the petitioners do not articulate a basis for the granting of a writ of certiorari by this Court, following is a discussion of the argument they present in the first half of their second section [Petition, pp. 29-35].

Petitioners begin by quoting from *United Steelworkers of America v. Warrior Gulf and Navigation Co.*, 363 U.S. 574, 582 (1960): "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Petitioners fail to include additional material from the same paragraph in the opinion, which provides an important perspective: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83.

Petitioners then turn to a case in which the Second Circuit found that a claim against a union that arose under the terms of specific federal labor statutes (§ 303 of the LMRA, 29 U.S.C. § 187, and § 8(b) (4) of the National Labor Relations Act, 29 U.S.C. § 158(b)) fell outside of a collective-bargaining agreement and thus was not subject to arbitration requirements under the contract. *Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Local Union No. 584*, 359 F.2d 598 (2d Cir.), *cert. denied*, 385 U.S. 832 (1966). In an astonishing feat of extrapolation, the petitioners formulate a general rule that ". . . a tort claim is not

subject to arbitration unless there is an explicit statement in the collective bargaining contract directing arbitration of a claim for tort damages." [Petition, pp. 31-32]. The petitioners do not actually quote from the opinion when they make this generalization because the court makes no such statement; in fact it makes no direct generalizations about tort claims, nor does it make any statements that could logically give rise to such a generalization.

Petitioners cite *Vulcan Materials Co. v. United Steelworkers of America*, 430 F.2d 446 (5th Cir. 1970) because it repeats *Old Dutch's* statement about a Section 303 claim. *Vulcan* also involves a Section 303 claim and does not expand upon *Old Dutch's* limited formulation.

Petitioners would interpret these cases as imposing a requirement on the district and circuit courts in the present case to look for specific mention of tort claims in the contracts between petitioners and Continental. However, in formulating their new unfounded "rule" about all tort claims, the petitioners ignore a broader reading of collective-bargaining agreements that has been supplied by this Court: "[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." *Warrior Gulf and Navigation Co., supra*, 363 U.S. at 581.

Petitioners next argue that the fact that an employee seeks a remedy which can only be secured by litigation ". . . is a fact which courts have considered in holding that the employee was not required to exhaust administrative remedies prior to filing suit." [Petition, p. 34]. Agreement with this statement does not significantly advance the petitioners' case. Petitioners do not provide a strong argument that the remedies they seek are the kind which would justify

the dropping of the requirement for exhaustion of remedies (grievance and arbitration procedures).

Petitioners cite *Brady v. Trans World Airlines, Inc.*, 401 F.2d. 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) in support of this argument. This case actually supports a position opposite to that of petitioners. Mr. Brady had two primary claims: one based on an allegation of a violation of the Railway Labor Act, 45 U.S.C. § 152, and the other on allegations of hostile discrimination on the part of his union. The circuit court found that because he had exhausted the administrative remedies associated with his Railway Labor Act claim, he was free to pursue that claim in court. The circuit also found that he was *not* free to pursue his claim based on hostile discrimination in court because he had failed to exhaust his administrative remedies. Moreover, the court held that this failure to exhaust precluded court access in spite of the fact that he claimed punitive damages and other remedies not available via administrative procedures.

The other case cited by petitioners in support of their claim that the absence of a remedy will sometimes excuse a failure to exhaust administrative proceedings is *Fruit and Vegetable Packers and Warehousemen Local 760 v. Morley*, 378 F.2d 738 (9th Cir. 1967). This case involves intraunion remedies, not remedies between an employer and employees as expressed in a collective-bargaining agreement. The plaintiffs, union members, sought access to union documents that they had a statutory right to obtain. The court found that they could bring their claim for access directly to court because there were no procedures whatsoever for achieving their goal. This is clearly distinguishable from the present case where all admit the existence of grievance and arbitration procedures.

Petitioners conclude the first half of their arguments supporting the second issue with a series of statements that

have to do with statutory interpretation and not contract interpretation: ". . . the company is not required to bargain over its decision to terminate one of its operations." [Petition, p. 34]; ". . . a failure to bargain over a closing is not a violation of the National Labor Relations Act." [Petition, p. 34]; and ". . . a decision to close a plant is not part of the 'terms and conditions' over which Congress has mandated bargaining." [Petition, p. 35].

The Eleventh Circuit placed these assertions in their proper light by pointing out first that the decisions cited by the petitioners all involve questions of statutory interpretation rather than contract interpretation and second, that the petitioners have not based their cause of action on the decision to close the plant but rather on management relations with the petitioners. Those relations are conceptually separate from the plant closing. *Mason v. Continental Group, Inc.*, 763 F.2d at 1224.

C. The Petitioners Conclude Their Petition With An Argument In Support Of An Issue That Was Not Decided By The Court Below.

The arguments on pages 35 through 41 of the Petition address an issue that was specifically not decided by the Eleventh Circuit. The petitioners begin their argument with the statement, "[t]he petitioners' causes of action brought pursuant to Alabama's fraud statutes are likewise not preempted by the National Labor Relations Act." [Petition, p. 35]. In its opinion below, the circuit court did not address any issues of preemption from the state courts. The court mentions specifically the question of "[w]hether the state law cause of action for breach of fiduciary duty is preempted by the National Labor Relations Act", *Mason v. Continental Group, Inc.*, 763 F.2d at 1221. The court indicates that "[s]ince we hold that the claims should have been submitted to arbitration, we need not decide the third point,

whether the state law breach of duty claim is preempted by the Labor Relations Act." *Id.* at 1221. Because the court found that petitioners' claims for fraud should also have been submitted to arbitration, it had no need of addressing the preemption issue in relation to them either. The issue provides no basis for the granting of a writ of certiorari by this Court.

CONCLUSION

For all of the above reasons, there is no merit in any allegation that certiorari should be granted 1) to resolve a conflict between the Eleventh Circuit's decision in *Mason* and another circuit court decision, 2) to review deviation from (or conflict with) the Supreme Court's teachings in cases such as *Alexander* and *Barrentine*, 3) to provide for review of petitioners' contract claims, or 4) to address issues not reached by the circuit court below.

The *Amaro* decision constitutes at most an internal Ninth Circuit division between different panels. Generally, the circuits are in agreement that the arbitration of pension disputes is not precluded under ERISA. Whether exhaustion is appropriate has been decided on the facts of each case. The strong federal policy favoring arbitrability where labor peace is involved, the unique statutory structure of ERISA with its required internal review process, this Court's teaching in *Schneider*, and the very broad internal review language used in the master agreement and pension plan in the instant case all attest to the correctness of the Eleventh Circuit's requiring petitioners to pursue their internal review procedures as provided in their collective bargaining agreements.

Petitioners present no issue of pressing importance that warrants this Court's exercising its discretionary jurisdiction. Accordingly, certiorari on this petition should not be granted.

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